August 2006

Update: Criminal Procedure Monograph 8—Felony Sentencing

Part II—Scoring the Statutory Sentencing Guidelines

8.6 Scoring an Offender's Offense Variables (OVs)

J. OV 9—Number of Victims

2. Case Law Under the Statutory Guidelines

The conflict resolution panel, convened to determine the proper interpretation and application of OV 9, overruled the conclusion in *People v Knowles*, 256 Mich App 53 (2003), and confirmed the reasoning in *People v Melton (Melton I)*, 269 Mich App 542 (2006), in which the Court disagreed with, but was bound by, the outcome in *Knowles*. *People v Melton (Melton II)*, ___ Mich App ___ (2006). Delete the February 2006 and March 2006 updates to page 58, and replace the third paragraph on page 58 with the following text:

An individual is a "victim" for purposes of OV 9 when a defendant's conduct places the individual in danger of *physical* injury or loss of life; an individual who suffers financial injury, or a type of injury other than physical, is not a "victim" for purposes of scoring OV 9. *People v Melton (Melton II)*, ___ Mich App ___, ___ (2006) (overruling the outcome in previous cases* where an individual and an institution suffered financial injury and were counted as victims under OV 9). The *Melton II* Court explained:

> "The Legislature did not explicitly restrict types of injuries by inserting the word 'physical' anywhere in the statute. It is therefore superficially logical to conclude that no such restriction was intended, in which case OV 9 could be scored for financial injuries.
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> "However, such an interpretation would also result in a conclusion that OV 9 should be scored for *any* sort of injury. We note there is no direction to score 'financial' injuries. Nor is there a direction to include 'psychological' injuries or, perhaps, 'social' injuries. Indeed, there is a veritable cornucopia of possible types of injuries

**People v Knowles*, 256 Mich App 53 (2003), and *People v Dewald*, 267 Mich App 365 (2005).

one could conceivably suffer as a result of a criminal act. Concluding that OV 9 is not limited to physical injuries effectively mandates that a trial court score points whenever a purported victim is placed in danger of *anything* that could be considered harmful, whether to the victim's person, pocketbook, reputation, self-esteem, or dignity.

"We do not believe the Legislature intended such an open-ended application, especially when the word 'injury' is viewed in the context of the rest of the statute. Our Supreme Court has explained that, in the absence of a clear indication that the Legislature intended us to do otherwise, this Court must examine the language of a statute in its grammatical and structural context. *People v Gillis*, 474 Mich 105, 114–115; 712 NW2d 419 (2006). The remainder of the statute clearly indicates that only physical injuries were contemplated.

"Under MCL 777.39(2)(a), scoring should 'Count each person who was placed in danger of injury or loss of life as a victim.' The statute further directs that the maximum number of points should be scored only in homicide cases where 'Multiple deaths occurred.' The only kind of 'injury' that can plausibly be juxtapositioned with 'loss of life' is physical injury to one's person. We cannot conclude that the Legislature intended to categorize financial loss with the gravamen of physical injury and death." *Melton II*, *supra* at ___ (emphasis in original).

Part III—Recommended Minimum Sentences for Offenders Not Sentenced as Habitual Offenders

8.9 Felony Offenses Enumerated in MCL 777.18 (Offenses Predicated on an Underlying Felony)

A. Controlled Substance Violations Involving Minors or Near School Property—MCL 333.7410

Effective June 26, 2006, 2006 PA 216 amended MCL 333.7410(4) to include the phrase "or within 1,000 feet of school property" that appears in similar provisions of the same statute. Therefore, replace the paragraph beginning with "**Possession of GBL or other controlled substance**..." near the top of page 88 with the following text:

Possession of GBL or other controlled substance on or within 1,000 feet of school property. MCL 333.7410(4) provides the penalty for persons aged 18 years of age or older who violate MCL 333.7401b or 333.7403(2)(a)(*v*), (b), (c), or (d), by possessing GBL or a controlled substance on or within 1,000 feet of school property. An offender convicted of violating MCL 333.7410(4) is subject to:

Part IX—Sentence Departures

8.51 Exceptions: When a Departure Is Not a Departure

Delete the April 2006 update to page 209 and insert the following text:

*People v Buehler (Buehler I), 268 Mich App 475 (2005), vacated 474 Mich 1081 (2006) (Buehler II).

When probation is an authorized alternative to imprisonment. In *People v Buehler (On Remand) (Buehler III)*, ___ Mich App ___, ___ (2006), the Court of Appeals determined that the legislative sentencing guidelines would apply to any sentence of imprisonment imposed on the defendant for his conviction of indecent exposure as a sexually delinquent person. The Court further found that under the statutory sentencing guidelines the trial court's sentence of probation would represent a departure for which the court failed to articulate substantial and compelling reasons. However, noting that amendments to MCL 750.335a effective after the Court released its first opinion in this case,* might result in a different outcome for crimes occurring after the amendment's effective date, the Court concluded that MCL 750.335a as it appeared at the time the instant offense was committed controlled its review of the case. Because MCL 750.335a, before it was amended, permitted a court to exercise its discretion and impose a sentence of probation rather than imprisonment, the *Buehler III* Court affirmed its previous ruling that probation was an appropriate penalty for the defendant's conviction. (A more detailed discussion of the case's history appears below.)

> **Note:** 2005 PA 300's amendment to MCL 750.335a may have eliminated a sentencing court's discretion with regard to the penalty imposed for conviction of MCL 750.335a(1). See MCL 750.335a(2)(c). This issue has not yet been addressed.

In *People v Buehler (Buehler II)*, 474 Mich 1081 (2006), the Supreme Court remanded the case to the Court of Appeals to consider whether the trial court's admitted departure (sentencing the defendant to probation rather than prison) was properly justified by substantial and compelling reasons and "whether any term of imprisonment that may be imposed by the circuit court is controlled by the legislative sentencing guidelines or by the indeterminate sentence prescribed by MCL 750.335a." *Buehler II*, *supra* at ___.

Using the rules of statutory construction, the *Buehler III* Court concluded that the legislative guidelines applied to any sentence of imprisonment imposed on the defendant because the applicable guidelines statute, MCL 777.16q, was more recently enacted than was the more specific statute, MCL 750.335a. *Buehler III*, *supra* at ___. According to the Court:

> "It is a well-settled tenet of statutory construction that when a conflict exists between two statutes, the one that is more specific to the subject matter generally controls. *In re Brown*, 229 Mich App 496, 501; 582 NW2d 530 (1998). However, it is equally well settled that among statutes that are pari materia, the more recently

> enacted law is favored. *People v Ellis*, 224 Mich App 752, 756; 569 NW2d 917 (1997). The rules of statutory construction also provide that inconsistencies in statutes should be reconciled whenever possible. *People v Budnick*, 197 Mich App 21, 24; 494 NW2d 778 (1992).
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> "Applying these rules to the instant case so as to reconcile the statutes at issue as nearly as possible, we find that even though MCL 750.335a is more specific with respect to the term of imprisonment that may be imposed for a conviction of indecent exposure as a sexually delinquent person, the intent of the Legislature is best expressed in the more recently enacted sentencing guidelines, which are therefore controlling when a trial court elects to impose imprisonment for such a conviction." *Buehler III, supra* at ___ (footnote omitted).

Recognizing that the prospective application of this reasoning to the two statutes as they currently read might result in a different outcome—MCL 750.335a, amended effective February 1, 2006, is more recently enacted than MCL 777.16q—the *Buehler III* Court expressed no opinion about whether the guidelines statute or the statute specific to the offense would apply to future convictions under MCL 750.335a(2). *Buehler III, supra* at ___ n 4.

With regard to the conviction at issue in the instant case, MCL 750.335a (at the time the Court first decided this case), specified the term of imprisonment to be imposed for a conviction *if* the court sentenced a defendant to a term of imprisonment. Because the *Buehler I* Court concluded that probation was a proper alternative to imprisonment, the Court did not address the applicability of MCL 777.16q, nor did it address the sentencing court's departure from the recommended sentence under the guidelines. As directed by the Supreme Court, however, the *Buehler III* Court considered the departure issue and found that the trial court's reasons for imposing a sentence of probation, rather than the penalty recommended under applicable sentencing guidelines, were not objective and verifiable as required by MCL 769.34(2) and *People v Babcock*, 469 Mich 247, 257–258 (2003). Specifically, the *Buehler III* Court stated:

> "[W]e find that the trial court's stated reasons for sentencing defendant to probation—that defendant was maintaining his sobriety and, in the court's opinion, possessed the ability to control his conduct when he was not drinking—are not objective and verifiable. Indeed, whether defendant possesses the ability to control his conduct when not drinking is a subjective determination not external to the minds of the judge, defendant, or others involved in the sentencing decision." *Buehler III, supra* at ___.

Because the *Buehler III* Court decided that this case was governed by the version of MCL 750.335a that gave the sentencing court discretion over

whether to sentence the defendant to a term of imprisonment, and because the general probation statute, MCL 767.61a, did not exempt MCL 750.335a from its scope, the *Buehler III* Court reaffirmed the conclusion in *Buehler I* that a sentence of probation under MCL 767.61a was a permissible alternative to the sentence of imprisonment recommended by the sentencing guidelines. Said the *Buehler III* Court:

> "Having resolved the questions addressed to us, we nonetheless reaffirm the trial court's imposition of a probationary sentence for the reasons stated in our prior opinion, which we observe was vacated by our Supreme Court rather than overruled. We do so because we conclude that resolution of these two questions does not call into question our prior analysis of whether defendant's probationary sentence was a lawful alternative to a prison sentence under the version of MCL 750.335a in effect at the time defendant committed the instant offense." *Buehler III, supra* at ___.